CHARLES E. CLARK

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NEARLY forty years of friendship makes it impossible for me to write objectively about Charles E. Clark. Our association goes back to the 1920's when he was ploughing the fields of procedure at Yale—a work of scholarship that was to flower years later in the Federal Rules of Civil Procedure. The years at Yale with him while he was first a professor and later Dean were rich in a warm, personal relationship. We produced a case book on Partnership together. We were associated with the Wickersham Commission on Law Observance and Enforcement and somewhere in its dusty files are some products of our work. We were together on many forums and proselytized many common causes.

His appointment to the Court of Appeals for the Second Circuit, in 1939, by Franklin D. Roosevelt, followed a long tradition. Dean Thomas W. Swan had also come to that court from the Yale Deanship and prior to him Dean Henry Wade Rogers.

As John P. Frank has stated, Judge Clark "needs more than judicial duties to keep busy. . . . He writes regularly for legal publications, recently revised several of his books, and during summers, of late, has taught law."[1] He has, indeed, long had great reserves of energy that have made him creative beyond most of us.

Perhaps it is the law professor still in him that makes him conscious of the duty of judges to be good housekeepers and to keep their cupboards, where rule, precedent and doctrine are kept, tidy and neat.[2]

He has been a stout defender of the jury system, knowing that judges develop callouses or prejudice that often keep them from resolving fact questions objectively and fairly. He answers every assault on the jury system,[3] regarding it as embodying a right, to use Madison's words, "resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[4]

When feelings ran high on the Wagner Act and trade unionists were suspect, Charles E. Clark stood fast behind the congressional policy concerning collective bargaining and helped bring a measure of justice coupled with law to the tumultuous labor-management field.[5]

1. Frank, *The Top U. S. Commercial Court*, 33 Fortune Magazine, January, 1951, pp. 92, 108.

2. See Puddu v. Royal Netherlands S.S. Co., 303 F.2d 752, 757 (2d Cir. 1962) (dissenting opinion); Blau v. Mission Corp., 212 F.2d 77 (2d Cir.), *cert. denied*, 347 U.S. 1016 (1954).

3. See, *e.g.*, Walters v. Moore-McCormack Lines, Inc., 312 F.2d 893, 898-99 (2d Cir. 1963) (dissenting opinion); Palermo v. Luckenbach S.S. Co., 246 F.2d 557, 561 (2d Cir.) (dissenting opinion), *rev'd*, 355 U.S. 20 (1957).

4. 1 ANNALS OF CONG. 437.

5. Art Metal Construction Co. v. NLRB, 110 F.2d 148, 152 (2d Cir. 1940) (dissenting opinion); NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756 (2d Cir. 1940); NLRB

It would take a tome to evaluate and appraise his judicial work. Two massive peaks make his career outstanding.

In the field of civil rights he has been bold and courageous, often standing apart from the crowd. During the days of the "witch hunt" in the 1940's, he wrote a classic dissent in *United States v. Josephson*,[6] on the power of legislative committees to investigate men's ideas and beliefs. A broad, undefined authority to probe anything "unAmerican" and make criminal anyone who refused to cooperate was in his view unconstitutional:

> After all, "subversive" means "tending to subvert" which, in turn, means "to pervert or corrupt (one) by undermining his morals, allegiance, or faith; to alienate. . . ." But advocacy of a change in political thought is certainly an attempt to undermine the faith of the present. All of this points to and underlines the real vice of so vague and ambiguous an authority when so determinedly marshalled against minority views. It invites and justifies an attempt to enforce conformity of political thinking, to penalize the new and the original, to label as subversive or un-American the attempt to devise new approaches for the public welfare, in short, to damn that very kind of initiative in experimentation which has made our democracy grow and flourish. . . .[7]
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> It is, of course, true that Congress, not the courts, has the responsibility of determining the need and extent of legislation within constitutional limits. And since it may forbid propaganda of dangerous proportions when it chooses, it obviously may investigate the need of such prohibition. But when it attacks not merely dangerous propaganda, but in effect all argumentation departing from the then norm, there is no justification for the wide reaches of its claim of authority.[8]

His ideas were not heeded and we were witnesses to a frightening inquisition.

It was in this same spirit that he called for judicial restraint when dealing with unpopular minorities. Mobs can march and chant but the courtroom must reflect no passion except that for justice. In a dissent to be remembered long after he is gone, he protested *summary* punishment for contempt of the lawyers in the communist trials.[9]

> . . . the law must both appear and be inexorable rather than vindictive; and the constitutional course of due process requires that conviction and sentence come only after orderly hearing upon announced charges and full opportunity to the accused to defend themselves. True, there is a single exception resting on necessity and common sense. If there are breaches of courtroom behavior to the point of preventing the proper functioning of the court, the judge has the authority to take the necessary steps to secure

v. Acme Air Appliance Co., 117 F.2d 417, 423 (2d Cir. 1941) (dissenting opinion); NLRB v. Empire Worsted Mills, Inc., 129 F.2d 668 (2d Cir. 1942); NLRB v. Standard Oil Co., 138 F.2d 885, 889 (2d Cir. 1943) (concurring opinion).

6. 165 F.2d 82, 93 (2d Cir. 1947) (dissenting opinion).

7. *Id.* at 96-97.

8. *Id.* at 97-98.

9. United States v. Sacher, 182 F.2d 416, 463, 466 (2d Cir. 1950) (dissenting opinion), *aff'd*, 343 U.S. 1 (1952).

> order. But if the difficulty does not require so drastic steps—has indeed been surmounted without resort to them—and the question is one only of punishment, as retribution and example, then the ordinary requirements of due process must be satisfied. For the person accused of a criminal contempt, like any other accused, is entitled to the opportunity to exculpate himself, so far as his evidence permits, before being sentenced to imprisonment. Hence the immediate issue in this case is not at all as between appropriate punishment and complete immunity from penalty; it is as to the maner in which the question of guilt or punishment can be legally and appropriately tried, or more broadly the course which will best preserve at once the rights of the accused and the dignity of the law in accordance with the highest standards of American justice. . . .
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> I know of no wiser course than to proceed deliberately according to the wisdom of the law as developed in other and perhaps less emotional times, and to approach judgment and punishment deliberately, but by that course the more surely and justly.

He honored the traditions of Due Process when he made this plea; and in retrospect many who at the time thought him wrong regret the blight on our record that those summary convictions wrought.

With the arrival of *Erie R. Co. v. Tompkins*,[10] federal courts have had to resolve more and more state law questions. There has emerged the "abstention" doctrine, described in origin "as a discretionary device used to forestall decision of a federal constitutional question in cases involving complicated questions of state administrative and regulatory policy."[11] Judge Clark has been critical of its development and broadening use.[12]

> . . . it appears to be employed even in cases where no constitutional issues are present and where no particularly delicate matters of state policy are at stake. It has been used in cases where the court has jurisdiction on diversity grounds, as well as when jurisdiction is based solely on a federal question. Because a majority of the Supreme Court has continued to insist on this principle, it has come to seem more mandatory than discretionary. As a result of this doctrine, individual litigants have been shuffled back and forth between state and federal courts, and cases have been dragged out over eight and ten-year periods.

Such criticism marks Judge Clark's attitude on the role of the judiciary. Some want the appellate courts to do as little as possible, to be highly selective in the cases they take for decision, to avoid so long as possible controversial issues. Thus, it is thought, the majority of the courts—particularly the United States Supreme Court—will be maintained against the hue and cry of critics. Judge Clark protests against that retiring role for the federal and state judiciary. In this highly complex society where government becomes more and more powerful, political processes are less and less effective in protecting

10. 304 U.S. 64 (1938).

11. Clark, *Federal Procedural Reform and State Rights; To a More Perfect Union*, 40 TEXAS L. REV. 211, 221 (1961).

12. *Id.* at 221; see also Clark, *The Limits of Judicial Objectivity*, 12 AM. U.L. REV. 1, 5 (1963).

minorities. As we become more dependent on each other, as we become more securely locked into a closed society with no frontier as an escape, we become more helpless. The passivity and retreat of the courts make many pressing problems fester and become worse—as evidenced by the long years in which the judiciary refused to interfere in the basic racial problems of the nation. Where there is no remedy, there is no right; and those plowed under by the *status quo* remain helpless. Judge Clark has put the idea in enduring words:

> . . . if a court tries to avoid an issue by deciding in the negative or for the defendant, why that is a decision, a negative precedent, of often far-reaching import. There is no way that decision can be avoided; there is only a kind of pressure—even presumption—to choose what seems the side closest to precedent and past action. And that means a conservative vote for inaction and the *status quo*. It is a sad, but little noticed, fact that neutral principles eventually push to re-enforce the dead hand of the law and the rule of the past.[13]

Judge Clark stands high above the ranks. He has brought new stature to the judiciary and added dignity to the law by reading it and writing it so that it brings justice to our ideological and racial ghettoes, as well as to the market place.

13. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660, 664 (1963).